No. 11644

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAMPSON MOTORS, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Facts.

Appellant Sampson Motors, Inc., a corporation, appeals from a judgment of the District Court in favor of the United States, adjudging the United States to be entitled to the sum of $17,543.08 held by Lockheed Aircraft Corporation, and a further judgment against appellant in the sum of $32.61. The moneys held by Lockheed Aircraft Corporation were withheld by it from moneys due Sampson Motors, Inc. pursuant to withholding directions of the Secretary of War.

On July 31, 1944, the Under Secretary of War, purporting to act under the Renegotiation Act of 1942, made a unilateral determination that $60,000.00 of profits realized by Sampson Motors, Inc. during its fiscal year ended June 30, 1942, under its contracts and subcontracts

subject to renegotiation, were excessive. [Tr. pp. 6-8, 49.] Appellant paid taxes upon its profits for said fiscal year and as a result of such tax payment was credited with $42,823.67 against said $60,000.00, leaving a balance claimed by the government in the sum of $17,176.33. [Tr. p. 49.] The Secretary of War directed Lockheed Aircraft Corporation to withhold payments otherwise due appellant on other contracts, to secure the government's demand. Lockheed Aircraft Corporation withheld $17,543.08. [Tr. p. 51.] The judgment of the District Court is based on the original claim, plus interest at 6% per annum from July 31, 1944 to November 2, 1945, using up all the funds withheld by Lockheed Aircraft Corporation and resulting in a deficiency of $30.20 to which interest at 6% was added, resulting in the judgment against appellant for $32.61. [Tr. p. 52.] Appellant claims title to the funds withheld by Lockheed Aircraft Corporation and denies the right of the government to any judgment against appellant. This action was instituted by the government against Lockheed Aircraft Corporation and appellant for the purpose of recovering the funds withheld and the deficiency.

There is little dispute concerning the facts leading up to the so-called unilateral determination of excess profits. A statement of said facts and issues was submitted to the trial court [Tr. p. 17] and filed by it. The government did not dispute the facts as therein set forth which are as follows:

Renegotiation was started about November 15, 1943, by Army Air Forces, Western Procurement District. Books and records of Sampson Motors were made available to Air Force auditors. Prior to any hearing Air Force officer verbally advised Sampson that he considered excess

profits for said fiscal year, prior to deduction for taxes, to be $60,000.00. Following this verbal notification on May 24, 1944, the Air Forces advised Sampson by registered mail that it desired to avail Sampson,

> "of the privilege of presenting to them any factors pertinent to the renegotiation of your fiscal year ended 30 November 1942, inasmuch as the settlement proposed to you has not been accepted by you."
>
> "The District Board has reserved the afternoon of Monday, 29 May 1944, to meet with you at District Headquarters, 3636 Beverly Boulevard, Los Angeles, California."

The president of Sampson Motors, with his counsel, was present at said time and place but was refused the privilege of introducing any evidence to show price reduction and comparative prices; efficiency in reducing costs; economy in the use of raw materials; efficiency in the use of facilities in the conservation of manpower; character and extent of subcontracting; quality of production; rate of delivery and turnover; inventive and developmental contribution with respect to important war products. At said meeting the Army Air Force officers advised the Sampson representatives that it had secured all the information it desired for determining said excess profits and did not wish to receive any evidence from the contractor, but insisted that the contractor execute an agreement agreeing to a determination of excess profits in the sum of $60,000.00, failing which the matter would be recommended to the Secretary of War for fixing of said amount. The contractor declined to execute such agreement but urged the right to introduce evidence concerning the figures above mentioned, which evidence was refused.

Thereafter on or about June 19, 1944, Sampson received a wire from the Chief, Renegotiation Branch of the War Department, Office of the Secretary, as follows:

> "Renegotiation impasse your company with Army Air Forces referred to this Board. Understand there is no material disagreement as to reported facts and figures and inability reach agreement due solely to amount of proposed refund. Careful review and consideration reports covering case indicate settlement fair and equitable. Should you consider further hearing desirable with board representatives in Washington meeting can be arranged for ten A. M., 29 June 1944, Room 3D 573, The Pentagon. In event this date inconvenient please advise by telephone or telegraph your choice not later than ten days thereafter. If meeting not deemed necessary no alternative but to submit case to under secretary of war for determination. Please advise by 26 June SPRAR."

At that time all transportation was on a strict priority basis making it virtually impossible to secure private transportation from Los Angeles to Washington, D. C. The court took judicial knowledge of this fact. [Tr. p. 71.] The urgency of the war program and the necessity for products being manufactured by the contractor was also such that absence from the business of Mr. Brett, the only person familiar with the matters involved in renegotiation, would have seriously impaired production of vital war materials. The contractor replied to the above wire on or about June 20, 1944, as follows:

> "There is no impasse. No determination or basis of claim for refund or settlement ever been presented. Local Board refused to allow us to present facts under

Sec. 403 A (4) so it is impossible for you to have all facts.

"Attendance in Washington is unreasonable as it would stop our entire production of essential Aircraft Parts that I have agreed to manufacture."

The contractor thereafter received a letter bearing date June 29, 1944, as follows:

"In accordance with our telegram to you of 19 June 1944, inasmuch as it has not been possible to work out an agreement as to the requested refund of $60,000 excessive profits for the year ended 30 November 1942, we are recommending that this case be submitted to the Under Secretary of War for his consideration."

Thereafter the contractor received letter bearing date July 31, 1944, from the Under Secretary of War enclosing a unilateral determination of excess profits to be $60-000.00. The text of said letter was as follows:

"I have reviewed the data furnished by your company and the proceedings in connection with your 1942 renegotiation with the War Department Price Adjustment Board and have reached the conclusion that the proposal heretofore made to your company by the War Department Price Adjustment Board should be affirmed. I have therefore made a unilateral determination that $60,000 of the prices and profits realized by Sampson Motors, Inc., during its fiscal year ended 30 November 1942, under its contracts and subcontracts subject to renegotiation pursuant to the

provisions of Section 403, are excessive. An executed original of such unilateral determination is inclosed herewith."

Thereafter the contractor received a letter bearing date September 16, 1944, from the office of the Under Secretary, War Department, advising that the Internal Revenue Agent at Los Angeles had computed the tax credit and that the contractor was entitled to a tax credit against said excess profits in the sum of $42,823.67 and requesting payment by transmittal of the difference of $17,176.33.

The contractor declined to transmit such difference, following which the Under Secretary of War directed Lockheed Aircraft Corporation to withhold payment to the contractor. The withholding directions to Lockheed were under date of October 12, 1944, instructing it to withhold $9,000.00; on January 8, 1945, changing the amount to $19,000.00; and on May 9, 1945, changing said amount to read $17,543.08. Pursuant to these directions Lockheed withheld payment to the contractor of the various invoices and purchase orders in the total sum of $17,556.54, which said amount it still holds.

Sampson had no prime contracts direct with the government but all of its war business was under purchase orders from prime and subcontractors. Some of said purchase orders contained the provision that "seller accepts this order subject, if applicable, to renegotiation pursuant to the provisions of Section 403, Sixth, Supplemental National Defense Appropriation Act of 1942." [Tr. pp. 17-21.]

ARGUMENT.

Appellant contends that the Renegotiation Act of 1942 is unconstitutional; that the unilateral determination of excess profits was void and beyond the jurisdiction of the Secretary of War; that the unilateral determination was arbitrary and without due process of law; that said unilateral determination has no weight as evidence and the trial court erred in considering it as evidence; and that the burden of proving excess profits was on the plaintiff, the finding of excess profits not being supported by the evidence; the judgment erroneously included interest.

I.

Renegotiation Act of 1942 Is Unconstitutional.

A. Text of Act.

The Act as originally enacted on April 28, 1942 (56 Stat. 245) provided (Sec. (a) (3)),

> "The terms 'renegotiate' and 'renegotiation' include the refixing by the Secretary of the Department of the contract price."

(Sec. (a) (4)) provided:

> "The term 'excess profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

The Act provided that in certain instances for contracts in excess of $100,000.00 the Secretary should insert certain provisions for renegotiation. Appellant here was not a prime contractor and had no contracts within the Act in excess or even approaching $100,000.00.

(Sec. (c) (1)) provided:

"Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price."

(Sec. (c) (2)) provided:

"Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (iv) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection."

(Sec. (c) (4)) provided:

"Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any lia-

bility for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable."

The Act as enacted on April 28, 1942, was by its terms applicable to all contracts and subcontracts thereafter and theretofore made, whether or not they contained a renegotiation or recapture clause, unless final payment had been made prior to April 28, 1942.

By Act of October 21, 1942 (56 Stats. 982) certain amendments were made in immaterial respects.

B. Unlawful Delegation of Authority.

The Act as effective for the fiscal year of appellant ending November 30, 1942, as hereinabove quoted, gave the Secretary of War authority upon renegotiation, to eliminate "excessive profits" and defined "excessive profits" as any amount which was found as the result of renegotiation to represent excessive profits. It prescribed no standards which the secretary must follow, but the question of whether or not the secretary would renegotiate any contract was left entirely to "the opinion of the secretary." It gave the secretary no authority to make a determination or take any other action except to negotiate and "upon renegotiation eliminate any excessive profits." The methods provided for elimination of profits were (1) by reduction in the contract price or other revision of its terms; (2) by withholding the amount thereof from amounts otherwise due the contractor; (3) by directing a contractor to withhold for the account of the United States such

amounts otherwise due a subcontractor; (4) by recovery through repayment, credit or suit of any such amount, or, (5) by any combination of the first four methods. The secretary was authorized to bring actions in the appropriate courts of the United States to recover any amounts of excessive profits paid to the contractor and not withheld or eliminated by some other method.

The most that can be said for the Act is that the secretary may renegotiate, and recover amounts fixed by agreement reached. It certainly cannot be implied from the Act that the secretary may determine and fix the amount of excess profits.

In sharp contrast are provisions of the Act adopted February 25, 1944, resulting in the present wording of the Act.

Among these amendments were the following:

> "Sec. (a) (3), The terms 'renegotiate' and 'renegotiation' include a *determination* by agreement *or order* under this section of the amount of any excessive profits." (Italics added.)
>
> Sec. (a) (4), (A) Redefines the term "excessive profits" to mean "the portion of the profits derived from contracts with the departments and subcontracts *which is determined in accordance with this section* to be excessive." (Italics added.)

There then follows a list of factors which shall be taken into consideration in determining excessive profits, including efficiency, reasonableness of costs and profits and various other factors. Said section further defined the term

> "Profits derived from contracts with the departments and subcontracts" to mean: "the excess of the

> amount received or accrued over the costs paid or incurred with respect thereto." (Sec. (a) (4) (B).)

and provided a method for determining the proper costs to be allowed.

The above mentioned amendments were made effective only with respect to fiscal years ending after June 30, 1943.

Although the word "renegotiation" does not appear to have been judicially defined, we may assume its meaning to be to "negotiate again." The terms "negotiate" and "negotiation," as applied to contracts, have been variously defined as follows:

> "to compromise; to effect something, or an effort to effect something, by treaty or agreement." (*Attrill v. Patterson,* 58 Md. 226.)
>
> "traffic or conclusion by bargain or agreement." (*Everson v. General Accident etc. Corp.,* 202 Mass. 169)
>
> "to conclude by bargain treaty or agreement." (*Morton v. Dubuque,* 287 Mass. 170.)

We do not question the sufficiency of the act as giving the Secretary authority to eliminate and recover excess profits *by agreement* with the contractor, after discussion to that end.

Such is the clear import of the language of the act.

However, any construction which implies the power in the Secretary to make a finding and final determination, over the objection of the contractor, is clearly outside and beyond the power granted by the act; and, without prescribing the limits of his authority or the norms for de-

termining the result, is a delegation of judicial and legislative functions contrary to the constitution.

> *Panama Refining Co. v. Ryan,* 293 U. S. 388, and cases there cited.

It might more properly be said that the objection here made is not to the constitutionality of the act, but to the constitutionality of the construction placed upon it by the government and by the trial court.

The provision in Sec. (a) (3) of the act that the terms "negotiate" and "renegotiation" include the "refixing by the Secretary of the contract price," does not enlarge or extend the usual meaning of such terms. When considered with the rest of the act, it authorizes the secretary to agree upon a new contract price. In other words, he may negotiate to a conclusion which results in fixing a different price.

To constitute a proper delegation of power, the authority conferred must be within definite constitutional limits. As said by the Supreme Court in *Panama Refining v. Ryan,* 293 U. S. 388, 432, 79 L. Ed. 446, 465 (quoting from *Wichita R. & Light Co. v. Public Utilities Commission,* 260 U. S. 48, 59, 67 L. Ed. 124, 130):

> "'In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rule enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make

a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this.' "

C. Taking Property Without Due Process.

If the act be construed to authorize the Secretary to *take* any profits which in his opinion are excessive, it violates the due process clause of the Vth Amendment of the Constitution.

Hart v. Wiltsee, 19 F. (2d) 903;

U. S. Harness Co. v. Graham, 288 Fed. 929.

If the act be construed to authorize the Secretary to sue for and recover any profits which he considers excessive, this again violates the "due process" clause, because the only measure of "excessive profits" is the "opinion" of the Secretary.

One of the principle elements of due process is equal protection, and adherence to those established principles of justice which afford every man an opportunity to a fair trial. If the law, or the process, is discriminatory or capricious; or arbitrary, it does not meet these requirements.

St. Joseph Stock Yards v. United States, 298 U. S. 38;

Morgan v. United States, 398 U. S. 468.

A law which empowers the Secretary to assess citizens at random for such amount as in his opinion is "excessive," is obviously not uniform or fair. Given identical circumstances and profits, the Secretary might under the law assess one citizen $100,000 and excuse the other entirely.

In *Spaulding v. Douglas,* 154 F. (2d) 419, profits on gross sales of $405,000 were reduced from 52% to 33%.

In this case, appellant had sales of $283,351.11 and a profit before taxes of $112,619.29 [Tr. p. 30] or approximately 39%. The Secretary seeks to eliminate $60,000, reducing the profit on sales to 21 9/10%.

No basis or reason for the determination in either case can be ascertained, since the only ground for renegotiation and the only measure of "excessive profits" was the "opinion of the Secretary."

The *recitation* in the so-called unilateral determination [Tr. p. 6] that certain factors were considered and that a full opportunity to be heard was afforded the appellant, cannot take the place of the lack of authority of the Secretary; and cannot breathe life into a void act.

Due process is a matter of substance, and its absence cannot be cured by a recitation that due process was afforded.

II.

Unilateral Determination of Excess Profits Was Void, and Beyond the Jurisdiction of the Secretary of War.

As earlier pointed out, the only authority of the Secretary under the act applicable here, was to eliminate excess profits by renegotiation. The act does not contain, either expressly or by implication, the authority to finally determine the amount of excess profits.

At most, the "unilateral determination" is an expression of the Secretary's opinion that profits of appellant were excessive in the sum of $60,000.

Such determination is unauthorized by the act, and can have no binding force on appellant.

To hold otherwise is to sanction government by decree; government of men, not of laws.

III.

Unilateral Determination Was Arbitrary and Without Due Process of Law.

The "unilateral determination" [Tr. p. 6] recites that renegotiations have taken place; that the Secretary considered certain data, "submitted by the Contractor or obtained from governmental or other reliable sources;" and "the Contractor has been granted full opportunity to submit such additional information and to present such contentions as the Contractor deemed material."

What data the Secretary considered is not disclosed and appellant has never been able to ascertain.

The testimony of Riley J. Brett, president of appellant on this subject follows [Tr. p. 66]:

> "Q. Was anything said concerning the method of arriving at the $60,000 figure? A. We wrote him a letter asking for the method of determination, but we never had any answer.
>
> Q. Did you ever receive any kind of a computation? A. I never did.
>
> Q. Or a document showing how that was determined? A. We never did.
>
> Q. Do you know how it was arrived at? A. I do not."

And of Bertha Brett, secretary of appellant [Tr. p. 92]:

> "Q. Did you ever endeavor to ascertain how that was arrived at? A. Yes, we asked him numerous times. I don't have any copy of the telegram, but I know that Mr. Bromley repeatedly asked him where they got this. We wanted to know whether it was just straight figures that they had obtained the $60,000 or whether it was penalty or what it was. I asked

him myself if there were any figures and I asked the auditors when they left if there were any figures that we would be able to obtain to see where they figured that we were excessive.

Q. What was their answer? A. Well, they would get around to it maybe, but that was their decision and they decided upon that, but that wasn't our affair."

The only hearing was one in Los Angeles, where the examiner refused to hear any evidence.

The hearing in Los Angeles was nothing except an effort by an army officer to bully appellant into an agreement that it had received $60,000 excess profits. The happenings at said meeting are set forth in the testimony of Riley J. Brett [Tr. pp. 63-65], and Bertha Brett. [Tr. pp. 91-92.] This was in no sense a hearing, but rather a demand that appellant admit and agree to refund $60,000 in excess profits. Appellant refused to sign such an agreement.

On June 19, 1944, appellant received a wire from the chief renegotiation branch, War Department as follows:

"Renegotiation impasse your company with Army Air Forces referred to this board. Understand there is no material disagreement as to reported facts and figures and inability reach agreement due solely to amount of proposed refund. Careful review and consideration reports covering case indicate settlement fair and equitable. Should you consider further hearing desirable with board representatives in Washington meeting can be arranged for ten A. M., 29 June 1944, Room 3D 573, The Pentagon. In event this date inconvenient please advise by telephone or telegraph your choice not later than ten

days thereafter. If meeting not deemed necessary no alternative but to submit case to Under Secretary of War for determination. Please advise by 26 June, SPRAR." [Tr. p. 19.]

Appellant answered this wire as follows:

"There is no impasse. No determination or basis of claim for refund or settlement ever been presented. Local Board refused to allow us to present facts under Sec. 403 A (4) (A) so it is impossible for you to have all facts.

"Attendance in Washington is unreasonable as it would stop our entire production of essential Aircraft Parts that I have agreed to manufacture." [Tr. p. 20].

This was followed by a wire from the War Department as follows:

"In accordance with our telegram to you of 19 June 1944, inasmuch as it has not been possible to work out an agreement as to the requested refund of $60,000 excessive profits for the year ended 30 November 1942, we are recommending that this case be submitted to the Under Secretary of War for his consideration."

Without further notice and opportunity to be heard the so-called unilateral determination of July 31, 1944, was sent to appellant.

It is obvious that these proceedings did not constitute such due process as that contemplated by the constitution.

IV.

Unilateral Determination by the Secretary of War Has No Weight as Evidence and the Trial Court Erred in Considering It as Evidence.

The position of the trial court was that the determination by the Secretary of War carried with it the presumptions of proper authority and of due process; that this determination amounted to evidence establishing a *prima facie* case, and that the burden of proof was thereby cast upon appellant to show that the actions of the secretary were arbitrary and that the secretary should have arrived at a different result. The court concluded that this burden had not been sustained by appellant and that the order of the secretary was sufficient evidence upon which to base a judgment for the Government.

It is appellant's position that the order of the secretary had no evidentiary value whatsoever, and that the court erred in receiving such order into evidence and affording it any weight.

In the case of *The J. Duffy,* 14 F. (2d) 426, the court had for consideration the provisions of the Volstead Act which provided for confiscation of a vessel which had been used for the transportation of liquor. That statute attempted to place the burden of proof upon the claimant. The court there held the statute to be unconstitutional as a denial of due process.

The court said at page 429:

> "If the true construction of that statute is that, in a suit to enforce a confiscation, the burden of proving his innocence lies upon the owner of the property sought to be confiscated, then I would have no hesitation in declaring that statute unconstitution-

al. To call such a suit dominated by such a procedural rule 'due process of law' is to delete all significance of the constitutional guaranty. In civil suits, the burden of proving his case by a 'fair preponderance of the evidence' lies on the plaintiff. In criminal actions the burden of proving the crime *beyond a reasonable doubt* lies on the state. Are we to understand that in suits aiming at confiscation the whole theory of our judicial procedure is reversed; that wholly irrespective of whether a libel has charged facts sufficient to constitute a cause of forfeiture, that wholly irrespective of whether a *prima facie* case has been presented or a case of probable cause, property stands confiscated to the government, unless the owner manages in some way to disprove something that has not even been charged or proven? The statute does not go to such lengths. It may well be that the burden of proof is shifted to the claimant when 'probable cause' has been sufficiently shown 'to be judged by the court.' I can conceive of no adequate showing of 'probable cause' short of a *prima facie* case. Indeed the intendment of the statute, as I read it, is merely to make such a *prima facie* case adequate to the purpose of confiscation, unless the claimant then assumes the burden of proof. In this interpretation of the statute I find myself in accord with the language of Julge Holt in United States v. One Pearl Chain (D.C.) 139 F. 510, as expressed by him at page 511."

In this case there is no statute purporting to shift the burden of proof to appellant. The action of the court in considering the unilateral determination of the secretary, and treating it as evidence constituting a *prima facie* case, finds no support in law and is contrary to all accepted concepts of justice.

V.

The Burden of Proving Excess Profits Was on the Plaintiff. The Finding of Excess Profits Is Not Supported by the Evidence.

As pointed out in the *Duffy* case above, in civil suits, the burden of proving his case by a preponderance of the evidence lies on the plaintiff. Applied to this case, in order to support such burden, it was incumbent upon the Government to establish that appellant received excess profits during the fiscal year ended November 30, 1942. Such evidence cannot be supplied by a statement of the Secretary of War that profits were excessive. To construe such declaration as having this effect, would be equivalent to a provision that the unsupported allegations of a petition might be considered as evidence of the facts therein recited, and that no evidence need be introduced to support such allegations.

The Government made no effort to introduce evidence tending to show that appellant's profits were excessive, but relied entirely upon the statement of the Secretary of War to that effect. Said statement was not authorized by the act, as applicable to appellant, and cannot be treated as evidence of excess profits.

It is appellant's position here that if a suit for the recovery of excess profits does lie, the burden is upon plaintiff to allege and prove that defendant received excess profits which are recoverable by the Government.

VI.

Interest Was Improperly Allowed.

The judgment included interest at 6% on $17,176.33 from July 31, 1944. [Tr. p. 44].

There is no provision in the Renegotiation Act of 1942, or other provision of law for the allowance of interest.

In the absence of statutory authority, no interest may be allowed.

Perkins v. Fourniquet, 55 U. S. 328;
Washington v. Harmon, 147 U. S. 571;
U. S. v. Verdier, 164 U. S. 213.

Conclusion.

It is respectfully submitted that the Renegotiation Act of 1942 is unconstitutional in that it makes an unlawful delegation of authority; and that it takes property without due process of law. That the unilateral determination by the Secretary of War was beyond the jurisdiction conferred upon him by the act; that the same was arbitrary and without due process of law; that the same was erroneously received in evidence by the court. The burden of proving excess profits, in order to entitle the Government to recover the same, was upon the Government.

It is respectfully submitted that the judgment should be reversed and the trial court should be directed to enter judgment in favor of appellant for the moneys which were withheld by Lockheed Aircraft Corporation, but which have now been paid into court.

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